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No. 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR CANADA PACKERS, LIMITED

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Due: September 9, 1966

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Foreword

In response to the Court's invitation in its order of October 11,.1965, the Solicitor General submitted a memorandum herein, stating the views of the United States, as *amicus curiae*. The memorandum, filed in December 1965, included a separate statement of the views of the Interstate Commerce Commission.

On July 26, 1966, the United States filed a brief stating that upon further study and reflection, the Solicitor General concluded that while the general approach outlined in that memorandum was sound, the specific method suggested for computing reparations in cases involving joint through international rates was unnecessarily cumbersome, and in some respects erroneous. This latest approach by the government advocates sweeping changes in the controlling case law as administered by the Interstate Commerce Commission since 1910, and would require, as the Solicitor General puts it, "the substantial modification" of this Court's decisions in *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654, and *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458.

The arguments of the Solicitor General in support of the government's position are so varied and complex that petitioner believes they should not be answered in this brief on the merits. The question raised by the lower court's decision is a narrow one and orderly procedure would seem to require that petitioner deal first with that subject and then file a separate brief in response to the government. Accordingly, this brief is confined to the matters involved in the lower court's decision. Petitioner will file as soon as practicable a brief in opposition to the views of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 36-40) is reported at 342 F. 2d 563. The findings of fact and conclusions of law of the United States District Court for the Northern District of Illinois, Eastern Division (R. 33-34) are not reported. The decision of the Interstate

Commerce Commission, Division 2 (R. 9-17) is reported at 313 I.C.C. 759; its reparation order of August 28, 1962 (R. 19-21) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 2, 1965 (R. 41). A timely filed petition for rehearing was denied on April 16, 1965 (R. 42).

The petition for a writ of certiorari was filed July 14, 1965, and was granted February 21, 1966 (R. 43, 383 U.S. 906). The jurisdiction of this Court rests on 28 U.S. Code § 1254(1).

QUESTION PRESENTED

The American railroad respondents joined with Canadian railroads in the establishment of joint through international rates which were applicable to and were assessed on petitioner's shipments from origins in New Mexico to destinations in Canada. Upon complaint by petitioner, the Interstate Commerce Commission found that the assailed joint rates exceeded maximum reasonable rates and awarded reparation to petitioner in the amount of the excess charges, including the proportion attributable to transportation in Canada. In an earlier proceeding, the Commission had found that the rates maintained by the American railroads from these same origins to various destinations in the United States, including the border points through which petitioner's shipments moved into Canada, were unreasonably high, determined the maximum reasonable rates and awarded reparation to complaining shippers for the difference.

The question presented is:

Did the Commission exceed its jurisdiction in awarding reparation to petitioner in the full amount of the excess charges assessed on its international shipments, including that proportion of the charges attributable to transportation in Canada or should the award have been limited by the difference between the unlawfully high rates to the border points and the maximum reasonable rates to such points?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act here involved are Sections 1, 6, 8 and 16, 24 Stat. 379 *et seq.*, as amended; 49 U. S. Code §§ 1, 6, 8 and 16, and are reproduced in the Appendix hereto.

STATEMENT

Proceedings before the Commission

Canada Packers is a Canadian corporation with principal place of business at Toronto, Ontario. It is engaged, among other things, in the manufacture of fertilizer at plants located in the provinces of New Brunswick, Ontario and Quebec, Canada (R. 25).

In July, 1947, the railroad respondents and substantially all other railroads in the United States, petitioned the Commission for an increase in their rates and charges on interstate and foreign commerce. In that proceeding, styled as *Ex Parte 166,* the Commission initially authorized a temporary increase of ten per cent effective October 13, 1947. That increase was superseded by an interim increase of twenty per cent effective January 5, 1948. In its final report in *Ex Parte 166,* the Commission authorized per-

manent increases, ranging from twenty to thirty per cent, subject to maximum increases on certain commodities, including a maximum increase on potash of $1.60 per ton. This maximum increase became effective May 6, 1948 (R. 25, 26).

In 1950, petitioner filed an informal complaint with the Commission alleging that the joint through international rates[1] charged by the American railroad respondents and their connecting Canadian carriers for the through transportation of 31 carload shipments of potash from Carlsbad and Loving, New Mexico,[2] to petitioner's plants at Toronto and Welland, Ontario; Montreal Quebec; and St. John, New Brunswick, Canada, during the period of the temporary increase, January 5, 1948, through May 5, 1948, were unjust and unreasonable, and reparation was sought. All of the shipments in question crossed the international border at Detroit or at Port Huron, Michigan (R. 26, 27).

Action on the informal complaint was deferred, awaiting decisions in similar cases then pending before the Commission, including *Consolidated Rendering Co.* v. *Atchison, T. & S. F. Ry. Co.*, 287 I.C.C. 673, 300 I.C.C. 87, which involved the same issue raised by petitioner—that the existing basic rates (on a number of commodities, including potash) as increased by the temporary percentage increases in effect

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[1] Rates hereinafter referred to are per net ton, unless otherwise indicated.

[2] The complaint before the Commission also involved shipments from Trona, California. Petitioner has received full reparation on these shipments, and they are not in issue here.

from January 5 through May 5, 1948, were unreasonable to the extent they exceeded basic rates plus the lower permanent maximum increases prescribed by the Commission in its final report in *Ex Parte* 166. (R. 8, 10, 11).

On March 18, 1957, the Commission handed down its decision in *Consolidated Rendering, infra,* holding that, during the period in question, the rates on potash (plus the temporary increases) from Carlsbad and Loving, New Mexico, to Port Huron and Detroit, Michigan, and certain other destinations, were unreasonable to the extent they exceeded the basic rates plus the permanent maximum increases found by the Commission to be reasonable (R. 15).

When the railroads refused to satisfy petitioner's informal complaint on the same relative basis, petitioner timely filed a formal complaint (R. 6-9). The evidence shows that prior to 1944, respondents had maintained a close relationship between the American rates and Canadian rates for comparable distances. The rates to Toronto and Welland were the same as to Buffalo. Montreal was 40 cents per ton higher than New York and St. John was 40 cents lower than Caribou, Maine. In cases decided in 1944 and 1946, the Commission found the rates to the American destinations unreasonably high and required reductions of 50 cents in the Buffalo rate, $1.40 in the rate to New York and $1.90 in the rate to Caribou. The respondents did not make any reductions in the rates to Toronto, Welland and St. John (R. 15, 16, 28, 29).

In its report of March 24, 1961, the Commission, Division 2, in *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.,* 313 I.C.C. 759, held that the joint through international rates assessed on petitioner's shipments were unjust and unreasonable. The record shows that the rates

to the American destinations and those to the Canadian destinations in question were as follows[3]:

From Carlsbad, N. Mex., to—	Distance (miles)	Rates[1] assailed	Reparation rates[2]	Difference
Detroit, Mich.	1,515	$13.32	$12.70	$ .62
Buffalo, N. Y.	1,747	14.04	13.30	.74
Welland, Ont.	1,728	14.64	13.80	.84
Toronto, Ont.	1,741	14.64	13.80	.84
New York, N. Y.	2,100	15.12	14.20	.92
Montreal, Que.	2,075	17.28	16.00	1.28
Vanceboro, Maine	2,461	17.28	16.00	1.28
St. John, N. B.	2,551	20.40	18.60	1.80
Caribou, Maine	2,589	18.60	17.10	1.50

[1] Basic rates plus the 20 percent interim increase authorized in Ex Parte No. 166.

[2] Rates incorporating the final increase authorized in Ex Parte No. 166, on which basis reparation was awarded in the *Consolidated Rendering* case and *Canada Packers* case.

The Commission concluded that Canada Packers was entitled to reparation in the amount of the difference between the charges collected and those which would have accrued at the lower rates found to be just and reasonable. In so holding, the Commission stated that the law was well settled that railroads within this country have the alternative of publishing reasonable and otherwise lawful rates applicable to or from the border (which respondents had not done) in which event they would be answerable only for those rates, or they could participate in joint through international rates (as respondents had done) and become jointly or severally liable for any unlawfulness found in such rates (R. 16, 17). Among the cases relied

[3] Based on Table II of Commission's report herein (R. 15) and its findings as to maximum reasonable rates to the Canadian destinations here involved (R. 17).

upon by the Commission were *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179; and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654 (R. 17).

The Commission rejected respondents' argument that the amount of reparation could not exceed the award made in *Consolidated Rendering* to Port Huron and Detroit, the border points at which petitioner's shipments crossed into Canada (R. 16, 17). A petition for reconsideration was denied on October 9, 1961 (R. 18).

By order dated August 28, 1962, the Commission directed the respondents and certain Canadian railroads to pay petitioner specific amounts of reparation, with interest, "insofar as the transportation took place over their lines in the United States." (R. 19-21). Respondents refused to pay reparation in the amount awarded but paid to petitioner an amount computed as if petitioner's shipments had terminated at Detroit and Port Huron[4] (R. 31, 32).

Proceedings in the lower Courts

Petitioner filed suit in the District Court[5] under Section 16(2) of the Interstate Commerce Act, 49 U.S. Code § 16(2), to recover from respondents the unpaid balance of $1,390.55 plus interest and a reasonable attorney's fee.

The District Court, following the principles of the *News Syndicate* and *Lewis* cases, concluded that the respondents had failed to establish lawful rates applicable to the border

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[4] The Commission ordered payment of $6,694.56, plus interest, on the shipments in question. Respondents paid $5,304.01, plus interest, leaving an unpaid balance of $1,390.55, excluding interest. (R. 32).

[5] The American railroads which are respondents here were the only parties against which suit was brought.

points, that such failure violated the Act, that the joint through international rates assessed on petitioner's shipments were the applicable rates, that the Commission had jurisdiction to determine petitioner's damages, if any, that the assessment and collection of the charges found unreasonable by the Commission was a tort for which the respondent railroads were jointly and severally liable without regard to the proportion of charges attributable to the transportation in the foreign country and that the Commission's findings were supported by the evidence. Judgment was entered for petitioner as prayed (R. 33, 34). The railroads appealed from that judgment (R. 35).

The Court of Appeals reversed the District Court and concluded, contrary to petitioner's contentions, that this case was not governed by *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654. In discussing the *Lewis* and *News Syndicate* cases, the lower court referred to this Court's observations that the railroads had not established rates which applied between the boundary and the American origin or destination. The Court of Appeals then concluded that the respondents in this proceeding had met the burden of proving rates from the New Mexico origins to the border points, that those rates must be considered as a maximum guide in awarding damages to petitioner, and that any other conclusion would require the respondent railroads to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads not parties to the case. It found such a result prohibited by the territorial limitation provisions of Section 1 of the Interstate Commerce Act (R. 39, 40).

SUMMARY OF ARGUMENT

The Interstate Commerce Act applies to common carrier railroads engaged in foreign commerce and to the transportation they render from points in the United States to a foreign country, but only in so far as the transportation takes place within the United States.

Under the Act, the carriers are required to establish and maintain rates applicable to any service performed thereunder and are subject to the further requirement that such rates must be just and reasonable. Every unjust and unreasonable rate is prohibited and declared unlawful. The statute makes railroads liable to any person who suffers damages resulting from a carrier's act or failure to act in violation thereof. The Commission has the duty to determine whether the railroads have violated the Act and, if so, to enter an order in favor of the injured party and against the railroads for the amount of such damages. If a railroad refuses to comply with a Commission order for money damages, the injured party is authorized to bring an action in the district court of the United States or in a state court of general jurisdiction to enforce such order.

Acting within this statutory framework, the Commission has consistently held, since 1910, that American railroads participating in international traffic have a clear alternative of either establishing lawful rates applicable between points in the United States and the international boundary, in which event they are answerable only for those rates or they may participate in joint through international rates covering the entire transportation and become jointly and severally liable for any unlawfulness found in such rates. This long established principle

of law is confirmed by the decisions in *News Syndicate Co.* v. *New York C.R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654.

The joint through international rates assessed on petitioner's shipments took precedence over all other rates, including those published from the New Mexico origins to the border points of Detroit and Port Huron, Michigan. In participating in these through rates, the respondents necessarily failed to establish lawful rates applicable on petitioner's traffic from points in the United States to the boundary as required by the Act. The Court of Appeals failed to understand that, as a matter of law, there can be only one rate applicable on a given shipment and that it applies to the exclusion of every other rate. This misunderstanding apparently was the primary reason the lower court found the decisions in *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 684 were not controlling in this case. Contrary to these decisions, the lower court would (erroneously) limit petitioner's damages by the rates to the border points on the ground that any additional amount would force defendants to pay damages on account of transportation performed in a foreign country. This Court, in the cases just cited, held that (1) the American railroads were liable for the full damages on the premise they were joint tort feasors with their connecting carriers and that they were jointly and severally liable for all the damage sustained by the shipper and (2) the Canadian carriers were not necessary parties to the suit.

The Court of Appeals misconstrued the decisions in *News Syndicate* and *Lewis* and its judgment should be reversed. Those cases, petitioner submits, control this one.

ARGUMENT

I.

The Interstate Commerce Commission had jurisdiction to determine whether the joint through international rates were excessive and, if so, to ascertain the amount of petitioner's damages.

The statutory provisions involved in this proceeding are Sections 1, 6, 8 and 16 of the Interstate Commerce Act, 49 U. S. Code §§ 1, 6, 8, and 16.

Section 1(1)(a) and (2) provide, *inter alia,* that the Act applies to common carrier railroads and the transportation which they render from any place in the United States to a foreign country, "but only in so far as such transportation takes place within the United States."

Subsection (5) of Section 1 provides, that all charges made for any service rendered in the transportation of property as aforesaid, shall be just and reasonable, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Section 6(1) and (7) require, in substance, that every common carrier shall establish rates for transportation rendered under the Act and that no carrier shall charge, demand, collect or receive a greater or less or different compensation than the rates specified in the tariff filed and in effect at the time of such transportation.

Section 8 makes carriers liable to any person injured as a result of the carrier's act or failure to act in violation of the provisions of the Interstate Commerce Act.

Section 16(1) authorizes the Commission, after hearing, to determine whether any party is entitled to an award of

damages for a carrier's violation of the Act and, if so, to enter an order directing the carrier to pay the sum determined by the Commission. Subsection 2 of Section 16 authorizes the institution of a complaint in the district court of the United States or in any state court of general jurisdiction if the carrier does not comply with an order of the Commission for the payment of money damages.

The question raised by this proceeding is the extent of the Interstate Commerce Commission's jurisdiction to award reparation in cases involving excessive joint through international rates. The issue is not novel or new and was resolved by the Court in its 1927 decision in *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, where the Court had before it certain questions certified to it by the Circuit Court of Appeals as to the jurisdiction of the Commission. The case involved the validity of a Commission order directing American railroads to pay reparation, which included the portion of excess charges attributable to transportation within Canada, based on a finding that the joint through international rate from Thorold, Canada to New York city was unreasonably high.

The first question asked by the lower court was whether the Commission had jurisdiction to determine the reasonableness of the joint through rate. This Court concluded that the Commission had such jurisdiction. As to the territorial reach of Section 1(1) and (2),[6] the Court said, at

[6] The case arose after Section 1 had been amended by the Act of February 28, 1920, 41 Stat. 474, which added the phrase, "but only in so far as such transportation * * * takes place within the United States." The amendment also added Subsection (2), which regulates the transportation of property within the United States and from the United States to a foreign country, but subject to the same proviso. As here pertinent, Section 1(1) and (2) have not been changed since the 1920 amendment.

pages 186 and 187 of 275 U.S.: "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. § 1(1) and (2)." Further, "It was the duty of defendants in error to establish just and reasonable rates for that service. § 1(5); § 6(1) and (7). They failed to make or publish any rate applicable to that part of the transportation."[7]

The railroad's failure to establish rates covering the transportation from the international boundary, in the Court's opinion, contravened the provisions of the Act and compelled the shipper to pay the excessive through charges. After observing that Section 8 of the Act made the railroads liable for damages sustained as a result of such failure the Court concluded that the Commission had jurisdiction to determine whether the shipper was entitled to an "'award of damages under the provisions of this Act for a violation thereof.' § 16(1)." The Court then held it was the duty of the Commission to ascertain the damages sustained and that in the ascertainment of damages it was obvious that the Commission had jurisdiction to determine the reasonableness of the charges exacted (275 U.S. 179 187).

The principles set forth in *News Syndicate* confirmed the Commission's view, first expressed in 1910, in *Black Horse Tobacco Co.* v. *Illinois Central R. Co.*, 17 I.C.C. 588, that the United States lines have an alternative with respect to their participation in international traffic—they

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[7] As shown under subject II of this argument section, respondents likewise failed to publish any rate applicable to the American portion of the transportation here in question.

may publish reasonable and otherwise lawful rates to and from the international boundary and stand answerable only for those rates or they may participate in joint through rates covering the entire transportation and become jointly and severally liable for any unlawfulness in such rates. This is still the Commission's position (R. 16, 17; Footnote 3, pages 14 and 15 of Memorandum filed herein by the United States, as *amicus curiae*). See also *Citizens Gas & Coke Utility* v. *Canadian Natl. Rys.*, 325 I.C.C. 527, 530.

Canada Packers urged in the Court of Appeals, as it does here, that its case is squarely within this Court's decision in *News Syndicate* and its decision in *Lewis-Simas-Jones* v. *Southern P. Co.*, 283 U.S. 654, discussed later herein, which followed and restated the *News Syndicate* principles. In dealing with petitioner's contention, the court below stated that while there was a through rate from a point in Canada to New York City, the *New Syndicate* decision pointed out that it was duty of the railroad to establish a rate from the international boundary to New York City, in the absence of which the shipper had been compelled to pay the through charges. The Court of Appeals then said (R. 39), "In the case at bar, rates from New Mexico to the border points were in effect and hence this case is not governed by *News Syndicate.*" The lower court erred in so concluding and its subsequent conclusions respecting the *Lewis-Simas-Jones* case were necessarily also erroneous.

II.

The Court of Appeals erred in holding that this case is not controlled by the decisions in News Syndicate and Lewis-Simas-Jones.

The lower court's discussion of the *News Syndicate* and *Lewis* cases and its conclusion that those cases are not governing here clearly show that it misunderstood what this Court said with respect to the railroads' obligation under the Act to establish just and reasonable rates applicable from or to the international boundary. Petitioner respectfully submits that in distinguishing the case at bar from the decision in *News Syndicate*, the Court of Appeals fell into the same error that caused the state court in *Lewis-Simas-Jones* to hold that the *News Syndicate* case was not controlling in that proceeding.

In the *Lewis* case, the defendant was an American railroad which had joined with a Mexican railroad in a joint through international rate on cow peas from Navojoa, Mexico, to San Francisco, California. The shipments moved through the border point of Nogales, Arizona. Upon complaint, the Commission found the joint rate unreasonable and ordered the American carrier to pay the full amount of reparation, including that portion representing charges attributable to transportation in Mexico. The railroad refused to make payment, and the shipper brought suit in a state court to enforce the award.

The trial court found that the railroad also maintained a rate from Nogales to San Francisco on this same commodity which was lower than the joint through rate, that the Commission had made no finding respecting the lawfulness of this lower rate and that it was reasonable and lawful for application on shipments from the border point

to San Francisco. It dismissed the shipper's suit on the ground that the Commission's order was void for lack of jurisdiction. (283 U.S. 654, 656, 657)

On appeal, the district court of appeal affirmed, stating that unlike *News Syndicate*, the railroad in the instant case had maintained a rate from the boundary to destination and that the shipper had not been compelled to pay the joint through rate by reason of any violation of the Act on the part of the defendant.

This Court reversed, holding that the lower court erred in distinguishing the case from *News Syndicate* and that *News Syndicate* was controlling. (283 U.S. 654, 659, 663) In passing on the lower court's conclusion regarding the applicability of the rate from the border point to destination, this Court said (page 663 of 283 U.S.) "The trial court's findings are not sufficient to show that at the time the shipments in question moved defendant maintained a just and reasonable rate *applicable* to the transportation of such shipment over its lines from the international boundary to destination. The tariff, as described in the findings, does not purport to *apply* to the American part of such international transportation." (Emphasis supplied)

The Court of Appeals in this proceeding failed, as did the state court in the *Lewis* case, to recognize that there can be only one rate applicable on a given shipment. In the instant case there is no question between the parties as to which set of rates were applicable, for petitioner and respondents have stipulated (R. 26) that "On all of these shipments defendants assessed the *applicable* single-factor, *joint through rates* from the mentioned United States origins to the described destinations in eastern Canada, * * *." (Italics added).

The stipulation simply confirms a fundamental principle of transportation law that joint rates take precedence over any combination of interim rates. In *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234, which involved joint through rates, this Court said "The tariff rate, although unlawful because excessive, was as between shipper and carrier the only legal rate. Neither would have been at liberty to avail itself of more favorable rates for any part of the through carriage." See also *Baltimore & O. S. W. R R. Co.* v. *Settle*, 260 U.S. 166, 172.

This rule of law is incorporated in the tariff circular regulations of the Commission at 49 C.F.R. 141.55:

> When a rate, whether local or joint, from point of origin to destination, has been established via a route, it becomes the only legal rate for through transportation via that route, whether it is greater or less than the aggregate of intermediate rates.

It is evident that this Court, in finding that the railroads in the *News Syndicate* and *Lewis* cases had failed to establish rates between the international boundary and points in the United States, was referring to the establishment of legal rates—that is, rates which were applicable to the shipments in question to the exclusion of all other rates published by the railroads. To labor the point somewhat, the joint through international rates assessed on petitioner's shipments, were the only legal rates for the through transportation. It follows, therefore, as in *News Syndicate*, that the railroads' failure to establish rates applicable between the international boundary and points in the United States as required by the Act, compelled Canada Packers to pay the through charges and invoked the jurisdiction of the Commission to determine whether petitioner had been damaged by the respondents' violation in failing

to establish such rates. This is a concept which the court below did not understand and which caused it to conclude that respondents had met the burden of proving rates from the New Mexico origins to the border points.

The New Mexico to border point rates are in precisely the same category as was the rate from the border point to San Francisco described in the *Lewis* case and the lower court here committed the same error made by the state court in that proceeding. On this point, the Court, after noting that the rates from the Arizona border to San Francisco did not apply, said (page 663) "the lower court erred in distinguishing this case from the *News Syndicate Co.* v. *New York-C. R. Co.*" case and "That case controls this one." Petitioner respectfully submits that case also controls this one.

III.

Petitioner's damages cannot properly be measured by the rates from New Mexico to the border points.

After finding that the railroads met the burden of proving the rates from Carlsbad and Loving to the Canadian border points, the lower court concludes that those rates must be considered as a maximum guide in awarding damages to Canada Packers (R. 40). Petitioner respectfully avers that, in so holding, the court below again misinterpreted the decisions in *News Syndicate* and *Lewis-Simas*.

The crux of those decisions approving full reparation, without any reduction for that portion of freight charges representing transportation within the foreign country, is clearly stated, at page 660 of the *Lewis* case, where the Court said:

> The collection by a common carrier of exorbitant charges is a tort (*Smith* v. *Chicago & N. W. R. Co.*, 49

Wis. 443, 448, 5 N.W. 240) and the general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 232, 233, 70 L.ed. 242, 249, 250, 46 S.Ct. 73. Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier. *News Syndicate Co.* v. *New York C. R. Co. supra* (275 U.S. 187, 188, 72 L. ed. 228, 229, 48 S. Ct. 39).

The decision in *Louisville & N. R. Co.* v. *Sloss-Sheffield Co. supra,* makes it abundantly plain why the defendant carriers are liable for the full amount of damages regardless of the proportion of the excess charges which may be attributable to any single railroad or group of railroads. The rates in question in that case were "strictly joint through rates" (page 233) which the Commission had held exceeded maximum reasonable rates by 35 cents per ton. Reparation was awarded on that basis. The defendant, Louisville & Nashville, contended that the reparation award was void as to it to the extent it exceeded 23 cents which amount the railroad claimed was its share of the excessive charges.

In rejecting that argument, the Court said at page 232:

> The Commission held early, and has consistently held since, that carriers who by means of a joint through rate make excessive charges are liable jointly and severally for all the damage sustained. (citing cases including *Black Horse Tobacco Co.* v. *Illinois C. R. Co.*, 17 I.C.C. 588.)

And at page 234, the Court went on to say:

> The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful

> receipt or unjust enrichment by the carrier. Every carrier who participates in the infliction of this wrong is liable *in solido* like every other joint tort-feasor. The tariff rate, although unlawful because excessive, was as between shipper and carrier the only legal rate. (italics supplied)
>
> • • •
>
> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole.

The foregoing cases make it evident that the respondents herein are joint tort feasors, and as such, are responsible for the entire damages without regard to whether or not they were individually responsible for the total injury inflicted upon petitioner. Section 8 of the Interstate Commerce Act provides, in effect, that, if any carrier shall do or shall cause to be done anything declared unlawful by that chapter, "such common carrier shall be liable to the person or persons injured thereby for the *full* amount of damages sustained in consequence of any such violation." (Italics supplied). See *International Nickel Co.* v. *Director General,* 66 I.C.C. 627, 628 and *News Syndicate,* 275 U.S. 179, 187. Petitioner respectfully submits that the lower court's use of the New Mexico to border rates as a maximum guide in determining damages is contrary to these important and well settled precedents.

There are other compelling reasons which should lead this Court to conclude that the Court of Appeals' maximum guide test is erroneous. The effect of the lower court's use of the New Mexico-to-border-point rates as a maximum guide for reparation purposes is to apply retroactively to petitioner's international shipments rates which did not apply under the governing tariffs. Stated differently, the lower court is attempting to substitute for the joint through

international rates the domestic rates from the New Mexico origins to Port Huron and Detroit. The result clearly violates the principle that a joint rate supersedes any combination of intermediate rates and is the only legal rate.

Further, if the lower court's judgment is permitted to stand, American railroads will be in position to establish and charge excessive joint through international rates with full impunity so long as they also maintain lawful rates between domestic points and the international boundary. Under that decision, the domestic rates would serve as the maximum measure of the injury to a shipper who was compelled to pay unreasonably high joint through rates. Obviously, if the rates between American points and the boundary were reasonable, the shipper would not be entitled to any damages. It is equally as obvious, however, that the shipper has been injured, but under the Court of Appeals' decision it would be an injury for which the law provides no remedy. The Commission has repeatedly rejected railroad arguments, which if accepted, would have resulted in the same inequitable situation that will confront all international shippers if the lower court's judgment is affirmed. See *Wolfe Fruit Co.* v. *Beaumont S. L. & W. Ry. Co.*, 211 I.C.C. 661, 662; also, Commissioner Eastman's concurring opinion in *Cynanamid and Cyanide From Niagra Falls*, 155 I.C.C. 488, 501, 502.

IV.

The connecting Canadian railroads are not necessary parties to this proceeding.

The Court of Appeals closes its opinion with the conclusion that the territorial limitation provisions of Section 1 of the Act prohibit the Commission from awarding reparation to a Canadian consignee on account of freight charges received for transportation performed within

Canada by Canadian railroads not parties to this action (R. 40). Petitioner has previously pointed up the lower court's error with respect to the territorial limitation of Section 1 and will not repeat those arguments here.

The court below was obviously influenced in some measure in reaching its decision by the fact that the Canadian carriers are not defendants in this proceeding. However, it is clear from the Court's decisions in the *News Syndicate* and *Lewis* cases that the Canadian railroads are not indispensable parties to an action of this nature. The foreign railroads were not parties in either of those cases. In the *News Syndicate* case, one of the several questions certified by the Court of Appeals specifically asked whether the suit could be maintained solely against the United States carrier. This Court answered in the affirmative (275 U.S. 179, 186, 188).

In the *Lewis* case the only defendant was the American railroad which handled the shipment from the border point to San Francisco. The fact that the Mexican line was not a party was immaterial for the Court held that the American defendant, as a joint tort feasor, was liable for all of the excess charges without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier (283 U.S. 654, 660).

The Interstate Commerce Act does not authorize or forbid the railroads to make joint through international rates. (Footnote 1, page 660 of *Lewis*.) But the Act does require defendants to establish just and reasonable rates applicable on international commerce in so far as the transportation takes place in the United States; in other words, between United States points and international borders. When railroads fail to establish lawful rates applicable to that

service they violate the act (as have respondents herein) and are liable to any person injured by their failure to do so.

When American railroads voluntarily join with Canadian carriers in an excessive joint through international rate, the Commission has jurisdiction to determine the reasonableness of that rate in deciding what damages the injured shipper has sustained. That the United States carriers may not be the sole cause of all the damage is immaterial. As joint tort-feasors they are responsible *"in solido"* for the injury.

These are the rulings of *News Syndicate* and *Lewis,* and lower court's decision, petitioner submits, is in direct conflict therewith.

IN CONCLUSION

Petitioner submits that the decision of the Court of Appeals is erroneous and should be reversed and the judgment of the District Court affirmed. Petitioner further urges that the case be referred back to the District Court for the assessment of costs and the determination of a reasonable attorney's fee to be paid by respondents to petitioner as authorized by Section 16(2) of the Interstate Commerce Act.

Respectfully submitted,

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Due: September 9, 1966

APPENDIX

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT, 24 STAT. 379, et seq. (49 U. S. Code § 1, et seq.)

SECTION 1 (49 U. S. Code § 1) provides:

CARRIERS SUBJECT TO REGULATION.

(1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * *.

* * * * *

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

TRANSPORTATION SUBJECT TO REGULATION.

(2) The provisions of this chapter shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States * * *.

* * * * *

JUST AND REASONABLE CHARGES.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * *

SECTION 6 (49 U.S. Code § 6) provides:

SCHEDULE OF RATES, FARES, AND CHARGES; FILING AND POSTING.

(1) Every common carried subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. * * *

* * * *

TRANSPORTATION WITHOUT FILING AND PUBLISHING RATES FORBIDDEN; REBATES; PRIVILEGES.

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are trans-

ported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * *

SECTION 8 (49 U. S. Code § 8) provides:

LIABILITY IN DAMAGES TO PERSONS INJURED BY VIOLATION OF LAW.

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

* * * *

SECTION 16 (49 U. S. Code § 16) provides:

AWARD OF DAMAGES.

(1) If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

PROCEEDINGS IN COURTS TO ENFORCE ORDERS; COSTS; ATTORNEY'S FEE.

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therin stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.